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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

**DRAFT AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT OF UKRAINE**

**ON
DRAFT LAW 1027
ON THE EARLY TERMINATION OF A DEPUTY'S MANDATE**

on the basis of comments by

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I. Introduction

1. By letter of 7 October 2019, the President of the Constitutional Court of Ukraine requested an amicus curiae brief of the Venice Commission on proposed constitutional amendments to Article 81 of the Ukrainian Constitution relating to the early termination of an MP's mandate (Draft law No. 1027).

2. Messrs. N. Alivizatos, J.M. Castellà, E. Holmoyvik and T. Otty acted as rapporteurs for this brief.

3. *This brief was drafted on the basis of comments by the rapporteurs. It was examined by the Sub-Commission on Democratic Institutions on ... and was subsequently adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Background

4. Early termination of an MP's mandate is set out in Article 81 of the Constitution of Ukraine. The 1996 version contained only factual grounds for losing the mandate; it was amended in 2004 introducing two new grounds for early termination: failure to remove the grounds for incompatibility (Article 81.2.5) and failure to join or remain in the parliamentary faction corresponding to the political party (or electoral bloc) on whose list the MP was elected (Article 81.2.6).

5. Article 81, as revised in 2004 and as currently in force reads:

Powers of National Deputies of Ukraine shall terminate simultaneously with the termination of powers of the Verkhovna Rada of Ukraine.

Powers of a National Deputy of Ukraine shall terminate prior to the expiration of his or her term in office in the event of:

(1) his or her resignation through a personal application; (2) a guilty verdict against him or her entering into legal force; (3) a court declaring him or her incapacitated or missing; (4) termination of his or her citizenship or his or her departure from Ukraine for permanent residence abroad; (5) his or her failure, within twenty days from the date of the emergence of circumstances preventing him or her from fulfilling a requirement concerning incompatibility of the deputy's mandate with other types of activity, to remove such circumstances; (6) his or her failure, as having been elected from a political party (an electoral bloc of political parties), to join the parliamentary faction representing the same political party (the same electoral bloc of political parties) or his or her withdrawal from such a faction; (7) his or her death.

The pre-term termination of powers a National Deputy of Ukraine shall also be caused by the early termination, under the Constitution of Ukraine, of powers of the Verkhovna Rada of Ukraine, with such termination of the Deputy's powers taking effect on the date when the Verkhovna Rada of Ukraine of a new convocation opens its first meeting.

A decision on early termination of powers a National Deputy of Ukraine on grounds referred to in subparagraphs (1), (4) of the second paragraph of this Article shall fall within the competence the Verkhovna Rada of Ukraine, while the ground referred to in subparagraph (5) of the second paragraph of this Article shall be a matter to be decided by court.

Where a guilty verdict against a National Deputy of Ukraine enters into legal force or where a court declares a National Deputy of Ukraine incapacitated or missing, his or her powers terminate on the date when the court decision becomes legally effective, while in the event of the Deputy's death on the date of his or her death as certified by the relevant document.

Where a National Deputy of Ukraine, as having been elected from a political party (an electoral bloc of political parties), fails to join the parliamentary faction representing the same political party (the same electoral bloc of political parties) or withdraws from such a faction, the highest steering body of the respective political party (electoral bloc of political parties) shall decide to terminate early his or her powers on the basis of a law, with the termination taking effect on the date of such a decision.

6. In its opinion on the constitutional amendments of 2004,¹ the Commission said as follows:

"A. National Deputies' mandate

10. The Commission welcomes the amendment to Article 81 § 2 (6) on national deputies' mandate which removed from the text the provision providing for the termination of a deputy's mandate on his or her dismissal from the parliamentary faction to which he or she belonged at the time of the election.

11. On the other hand, it is to be regretted that according to the revised Article 81 § 2 (6), a deputy's mandate would be terminated on his or her leaving or not joining the parliamentary faction to which he or she belonged at the time of the election. The relevant decision would be taken by the highest steering body of the respective political party, or election bloc of political party (Article 81 § 6).

12. Keeping the proposed procedure in the Constitution give the parties the power to annul electoral results. It might also have the effect of weakening the Verkhovna Rada itself by interfering with the free and independent mandate of the deputies, who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Parliament. As the Commission has stressed in its previous opinion, linking a mandate of a national deputy to membership of a parliamentary faction or bloc is also inconsistent with the other constitutional provisions bearing in mind that Members of Parliament are supposed to represent the people and not their parties (footnote: The oath to be taken by Deputies contained in Article 79 of the Constitution expresses this clearly. See CDL-AD (2003)019, para. 56 – 58).

13. The Commission thus strongly recommends that Article 81 § 2 (6) and 81 § 6 be removed from the Constitution. Instead, the free and independent mandate of the deputies should be explicitly guaranteed. "

III. Analysis

7. Draft Law No.1027 proposes to amend Article 81 as follows:

"Article 81. The authority of People's Deputies of Ukraine shall be terminated simultaneously with the termination of authority of the Verkhovna Rada of Ukraine. The authority of a People's Deputy of Ukraine shall be terminated prior to the expiration of the term in the event of:

¹ Venice Commission, Opinion on the Amendments to the Constitution of Ukraine Adopted on 8.12.2004, [https://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD\(2005\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD(2005)015-e)

- 1) resignation through a personal statement - from the moment of announcement of such statement by a People's Deputy of Ukraine at the plenary session of the Verkhovna Rada of Ukraine;
- 2) a guilty verdict against him or her entering into legal force;
- 3) a court declaring him or her incompetent or missing or dead;
- 4) termination of his or her citizenship or his or her departure from Ukraine for permanent residence abroad;
- 5) establishment by a court of the fact of a non-personal vote of the People's Deputy of Ukraine in the Verkhovna Rada of Ukraine, that is voting by the People's Deputy of Ukraine instead of another People's Deputy of Ukraine or giving the opportunity by a People's Deputy of Ukraine to vote instead of him or her to another People's Deputy of Ukraine - from the moment of entering into legal force of the court's decision establishing this fact;
- 6) failure of a People's Deputy of Ukraine, as having been elected from a political party, to join the parliamentary faction of this political party or his or her exit from such a faction;
- 7) his or her absence without valid reasons at one third of plenary meetings of the Verkhovna Rada of Ukraine and / or meetings of the Verkhovna Rada Committee of which he/she is a member during one regular session;
- 8) violation of requirements for incompatibility of the deputy's mandate with other types of activities, if within twenty days from the day of occurrence of circumstances that lead to violation of such requirements, these circumstances are not eliminated;
- 9) his or her death.

The authority of a People's Deputy of Ukraine shall be also early terminated in case of early termination, under the Constitution of Ukraine, of the authority of the Verkhovna Rada of Ukraine, with such termination of the deputy's authority taking effect on the date when the Verkhovna Rada of Ukraine of a new convocation opens its first meeting.

In case of violation of the requirements for incompatibility of the deputy's mandate with other types of activities, absence of a People's Deputy of Ukraine without valid reasons at one third of plenary meetings of the Verkhovna Rada of Ukraine and / or meetings of the Verkhovna Rada Committee of which he or she is a member during one regular session, his or her authority shall Be early terminated by a decision of the Supreme Court. In case of termination of citizenship of Ukraine or departure of a People's Deputy of Ukraine for permanent residence outside Ukraine, his or her authority shall Be terminated from the moment of adoption of the relevant decision by the Verkhovna Rada of Ukraine. In case of death of a People's Deputy of Ukraine, his or her authority shall be terminated from the day of death, certified by the death certificate, without the decision of the Verkhovna Rada of Ukraine.

In case of failure of a People's Deputy of Ukraine, as having been elected from a political party, to join the parliamentary faction of this political party or his or her exit from such faction, his or her authority shall Be early terminated on the basis of the law by decision of the highest governing body of the respective political party from the date of the adoption of such decision.

In case a court declares a People's Deputy of Ukraine legally incompetent, missing or dead, his or her authority shall be terminated from the day the relevant court decision comes into force".

8. The President of the Constitutional Court of Ukraine has put six questions to the Venice Commission. The Commission will provide a reply to these questions to the extent that they raise matters which are within its competence. In this respect, the Commission recalls at the outset that its task is not to say whether or not the draft amendments to the Constitution are in conformity with the Constitution of Ukraine, as the authoritative interpretation of the Constitution, hence the answer to these questions, falls within the exclusive remit of the Constitutional Court according to the parameters of Article 157 of the Constitution; the Commission will therefore only provide elements mainly drawn from international standards and from comparative constitutional law and constitutional theory which may usefully contribute to that Court's analysis.

- A. Do the new elements stipulated by Draft Law No. 1027 regarding the grounds and the procedure for early termination of the powers of the People's Deputy of Ukraine have any relationship with the institutes of "human rights" and "citizens' rights? If so, what does such relationship imply?

9. The institutes of "human rights" and "citizen rights" presumably refer to the criteria in Article 157 of the Constitution of Ukraine. This provision prohibits constitutional amendments that "foresee the abolition or restriction of human and citizens' rights and freedoms". At the outset, it should therefore be emphasised that it is for the Constitutional Court of Ukraine to be the final interpreter of Article 157 and the concepts therein. The Venice Commission can only reply to the question from a general point of view, taking into account international and comparative law (Article 81.2.5 and 7).

10. The new elements to Article 81 of the Constitution introduced by Draft Law No. 1027 mainly concern two new grounds for the early termination of the powers of members of the Verkhovna Rada.

11. In international human rights law, exercising the mandate as a lawfully elected representative of parliament is a corollary of the right to stand for election. This right is enshrined in Article 3 of Protocol 1 of the ECHR. The case law of the ECtHR makes it clear that the rights enshrined in Article 3 of Protocol 1 of the ECHR are not limited to the right to vote and the right to stand for election, but also encompass the right to sit as a member of parliament once he or she has been elected by the people. According to the same case law, the right guaranteed in Article 3 of Protocol 1 of the ECHR is subject to implied limitations in respect to which the state has a wide margin of appreciation. Such restrictions must nonetheless be lawful, have a legitimate aim, and be proportionate. The rationale behind this rule is that the substantial right of free and fair election protected by Article 3 of Protocol 1 of the ECHR would be an empty shell if the legal protection of that right did not extend to the elected representatives in carrying out their duties on behalf of the voters.² It is thus clear that the scope of Article 3 of Protocol 1 of the ECHR extends to the loss of a parliamentary mandate due to *i.a.* resignation,³ disqualification,⁴ incompatibility,⁵ or the dissolution of parties.⁶

12. Accordingly, the termination of the mandate of elected representatives to parliament falls within the scope of Article 3 of Protocol 1 of the ECHR. However, that right is not absolute. As is the case with most of the human rights guaranteed by the ECHR, the right to stand for election and to serve as a representative if elected may be subject to limitations. Therefore, if the interpretation of Article 157 of the Constitution of Ukraine is to correspond to international human rights law, the question should not be limited to whether the termination of a parliamentary mandate *interferes* or has any relationship with a human right or not. It does, but a simple positive or negative answer to the question does not necessarily reflect the contents and scope of the right or determine whether or not a *violation* of the ECHR would be involved. Rather the question should be whether the termination is lawful, has a legitimate aim, and is proportionate to the aim pursued. This consideration should take into account the threshold and procedural requirements set by the ECtHR and European standards (see below). These observations are without prejudice to the fact that, as a matter of conventional constitutional interpretation, it would be open to the Constitutional Court to conclude that Article 157 is intended not merely to protect

² See *M v. United Kingdom*, no. 10316/83.

³ See *Paunovic and Milivojevic v. Serbia*, no. 41683/06; *Occhetto v. Italy*, no. 14507/07.

⁴ See *M v. United Kingdom*, no. 10316/83.

⁵ See *Lykourrezos v. Greece*, no. 33554/03.

⁶ See *Sadak and others v. Turkey (No. 2)*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95.

against *violations* of the ECHR, but also to prevent *any* reduction or restriction in the protection of fundamental rights enshrined in the Constitution, even if not rising to the level of a violation.

B. Can the approval of the proposed amendments lead to a “restriction of human and citizens’ rights and freedoms” (in the context of Article 157.1)?

13. In its 1997 opinion on the then Constitution of Ukraine, the Venice Commission welcomed that the Constitution, through Article 157.1, tried “to guarantee the essence of human rights by outlawing their abolition.” The Commission found that the clause of Article 157.1 left a large scope for interpretation by the Constitutional Court.

14. In its report on constitutional amendment, the Venice Commission considered that *“constitutional provisions on fundamental human rights should as a matter of principle be open to debate and amendment, whether in order to extend, confirm or even in some cases restrict their reach and contents. This however has to be done in a careful way, and subject to strict requirements so as not to weaken the function that such provisions have in protecting individual and minority interests against the will and whims of the majority. Furthermore, such national amendment processes have to take into account international legal obligations as well as the legitimate role of national and international courts in developing and protecting human rights.”*⁷

15. As demonstrated in this brief, the proposed amendments entail an interference with (and restriction of) certain fundamental rights, notably Article 3 of Protocol No. 1 to the ECHR. Current Article 81 as amended in 2004 provides for even more interference and restriction.

16. It is for the Constitutional Court of Ukraine to interpret the extent to which constitutional amendments restricting the rights of the members of parliament may impact the enjoyment of fundamental rights without conflicting with the prohibition set out in Article 157.1 of the Constitution of Ukraine.

C. Can the proposed amendments to Article 81 (Chapter IV of the Constitution) be considered in the context of the fundamental principles of the constitutional order of Ukraine as defined in Chapter I of the Constitution, in particular, by provisions of Article 1 (the principle of democracy), Article 3 (the principle of human rights), Article 8 (the principle of the rule of law)?

17. The preservation of the rights and prerogatives of an MP is a question going to the heart of democracy and how it functions. In that sense, the proposed amendments undoubtedly impact upon the “democratic” character of the Ukrainian State guaranteed by Article 1 of the Constitution. In concrete, upon the representative democracy and the free mandate.⁸

18. In addition, as argued in this brief, the loss of a parliamentary mandate amounts to an interference with the human rights protected by Article 3 of Protocol No. 1.

⁷ Venice Commission, Report on Constitutional Amendment, CDL-AD(2010)001, § 177.

⁸ For the Venice Commission, “[t]he principle of free political mandate and its corollary, the prohibition of any imperative mandate, are at the foundations of representative democracy”: see Venice Commission, Report on the recall of mayors and local elected representatives, CDL-AD(2019)011, § 13.

D. Are the new elements, envisaged by Draft Law No. 1027 regarding the grounds and procedure for early termination of the powers of the People's Deputy of Ukraine, in compliance with the European standards implied by the requirements of the triad of values which form the basis for the common European legal order, namely: democracy, human rights, the rule of law?

A. *Loss of mandate for failing to join or exiting from a parliamentary faction*

19. The amendment to Article 81.2.7 is a relatively minor revision of Article 81 section 4 (6) in the current Constitution. This provision terminates the powers of an elected representative to the Verkhovna Rada in the case of “failure as having been elected from a political party to join the parliamentary faction of this political party or his or her exit from such a faction”.

20. The reference to “electoral bloc of political parties” in the current text would be removed, presumably against the background of an intended amendment to the electoral legislation. This change appears as technical and should not have any bearing on the constitutionality of electoral blocs of political parties as such.

21. Article 81.2.7 provides that in cases of failure to join or of exit from a parliamentary faction the mandate of an MP elected from a party list is automatically terminated by a decision of “the highest governing body of the respective political party”. While Article 81 does not formally subject Ukrainian members of parliament to an imperative mandate, which would allow the representative to be recalled by the voters or expelled as *having been elected from a political party*, by the party, it nonetheless limits the possibility for the MP, for whatever political or personal reason, to become independent and even possibly to change party affiliation, lest he or she lost the membership in the parliament.⁹

22. The Venice Commission has previously noted in this regard that:

“32. The establishment of an obligatory link between an elected national deputy (who belongs to the electoral list of a party or bloc of parties) and his or her parliamentary group or bloc has the effect that a breach of this link (withdrawal or exclusion of a deputy belonging to a particular parliamentary group or bloc from his or her parliamentary group or bloc) would therefore ipso facto put an end to the parliamentary mandate of the deputy concerned. This is contrary to the principle of a free and independent mandate.

33. Even if the question of belonging to a parliamentary group or bloc is distinct from the question of submission to the group’s or bloc’s discipline in concrete situations, the freedom of the mandate implies the deputy’s right to follow his or her convictions. The deputy can be expelled from the parliamentary group or bloc, or can leave it, but the expulsion or withdrawal from the group or bloc should not involve per se the loss of the deputy’s mandate.¹⁰”

23. The common democratic traditions of the European peoples, referred to by the preamble of the Statutes of the Council of Europe (1949), privilege representative democracy rather than party, and even less factional, democracy. In other words, in choosing our representatives, we take into consideration, beyond party affiliation, the candidates’ skills, honesty and openness. Because, as stressed by Edmund Burke in his famous address to the electors of Bristol (1774), “parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the

⁹ In Portugal, membership in the parliament is terminated if “they register as members of a party other than that for which they stood for election”, see the Constitution of Portugal, Article 160.

¹⁰ Venice Commission, Opinion on the Amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine, CDL-AD(2017)026, §§ 32,33.

general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of parliament".

24. The Venice Commission has consistently argued that losing the status as a member of parliament due to 'crossing the floor' or switching party is contrary to the principle of a free and independent mandate, which forms part of the European constitutional tradition.¹¹

25. The same principle flows from Article 25(a) of the International Covenant on Civil and Political Rights, which guarantees the right to participate in public affairs "through freely chosen representatives". General Comment no. 25 of the United Nations Human Rights Committee prohibits unreasonable limits to the right to stand for election by requiring candidates to be members of parties or of specific parties.¹²

26. The same fundamental principle can be observed from the ECtHR case law on Article 3 of Protocol 1 to the ECHR. While states enjoy a wide margin of appreciation, in particular in relation to imposing conditions on the right to stand for elections,¹³ such conditions must not "thwart 'the free expression of the opinion of the people in the choice of the legislature'".¹⁴ Depriving lawfully elected representatives of their mandate to serve in the parliament due to a representative's political affiliation, which includes the choice of rejecting membership in parties or political factions, is an interference with the people's choice of legislature. Choosing political affiliation and changing political parties or factions lies within each representative's right to freedom of expression and association and should be considered as fundamentally democratic actions. Interferences must have a legitimate aim and be proportional. For example, the Venice Commission has expressed the view that the withdrawal of the right to be elected and to serve as a representative due to criminal conviction for serious offences should be considered as a means of preserving democracy and the voters' trust in it.¹⁵

27. The stated aim of the amendment is to ensure parliamentary discipline. The Venice Commission has recognised that frequent and sudden changes of affiliation to political parties by members of parliament may be problematic for political stability, and that states may adopt certain legal measures to prevent floor crossing or breach of party discipline.¹⁶ However, such measures must be proportionate, and the Venice Commission has consistently warned against the termination of mandate due to floor crossing. As for the specific context of Ukraine, the Venice Commission warned against Article 81 section 2 (6) already when it was adopted in 2004: *"In accordance with the proposed amendments, a Deputy's mandate would be terminated on his or her leaving or a failure to join the parliamentary faction from which he or she was elected (Article 81.3). Whilst the idea of having this provision in the Draft Law is presumably to promote stability and the effectiveness of the governing party or bloc in circumstances where fragmentation of parliamentary blocs is a problem, it would also have the effect of weakening the Verkhovna Rada itself by interfering with the free and independent mandate of the deputies, who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Parliament."*¹⁷

¹¹ See CDL-AD(2009)027, par. 39; CDL-AD(2019)015, par. 51. See also the Venice Commission's Code of Good Practice in Electoral Matters, Guideline I.1.1.d.

¹² See General Comment no. 25, *The right to participate in public affairs, voting rights and the right of equal access to public service*, par. 17: "The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties."

¹³ See *Paksas v. Lithuania* [G.C.], no. 34932/04, par. 96; CDL-AD(2017)025, par. 22.

¹⁴ See *Mathieu-Mohin and Clerfayt v. Belgium*, no. 9267/81, par. 52; *Matthews v. the United Kingdom* [G.C.], no. 24833/94, par. 63; *Hirst v. The United Kingdom* (no. 2) [G.C.], no. 74025/01, par. 62; *Scoppola v. Italy* (no. 3) [G.C.], no. 126/05, par. 84.

¹⁵ See CDL-AD(2017)025, par. 11.

¹⁶ See CDL-AD(2019)015, paras. 53-55.

¹⁷ See CDL-AD (2003)19, par. 19.

28. In its subsequent opinions, the Venice Commission has reiterated its criticism of Article 81 section 2 (6) in the Ukrainian Constitution and argued in favour of a free and independent mandate.¹⁸ In Resolution 1549 (2007), the Parliamentary Assembly of the Council of Europe has also declared that the same provision in the Ukrainian Constitution is “unacceptable in a democratic state”.¹⁹

29. The Venice Commission has also argued with reference to Ukraine that considering change in party affiliation as grounds for the termination of a parliamentary mandate apparently runs counter to the principle of representation as reflected in the Ukrainian constitution. Although this is ultimately a matter for the Constitutional Court itself, the independence of the members of parliament appears to follow from Article 5 of the Constitution (“The people exercise power directly and through bodies of state power and bodies of local self-government”). Moreover, the oath regulated in Article 79 of the Constitution (“*Before assuming office, National Deputies of Ukraine take the following oath before the Verkhovna Rada of Ukraine: "I swear allegiance to Ukraine. I commit myself with all my deeds to protect the sovereignty and independence of Ukraine, to provide for the good of the Motherland and for the welfare of the Ukrainian people. I swear to abide by the Constitution of Ukraine and the laws of Ukraine, to carry out my duties in the interests of all compatriots."*”), requires the members of the Verkhovna Rada to carry out their duties on behalf of “all compatriots”, which further appears to imply a free and independent mandate.

30. To conclude, Article 81 section 2 (6) in both its current and in its amended form, runs counter to the principle of a free and independent mandate as reflected in international legal principle and, apparently, other provisions of the Constitution of Ukraine. The mandate of an individual on election is to serve the interests of his or her constituents even if this means not joining or breaking with a political faction. In addition, MPs, including in Ukraine, serve the interests not only of their constituents, but of all “compatriots”. Instability in the parliament due to frequent and serious breaches of party discipline or defections can and should be met with other counter-measures than the loss of mandate. It is hard to see how an automatic loss of membership in the parliament in case of exit from party or faction affiliation, even if the MP does not become member of another party or faction, can be a proportionate measure to ensure parliamentary discipline.

31. The loss of mandate for failure to join a parliamentary faction may also amount to an interference with the freedom of expression of the deputy.

B. Loss of mandate due to absence

32. Article 81.2.7 of the Draft Law introduces a limit of absence to one third of the plenary and/or committee meetings per session. As indicated by the Venice Commission in the Checklist on parameters on the relationship between the parliamentary majority and the opposition in a democracy, members of parliament may be absent for a number of reasons, and attendance in the plenary is not necessarily required for the fulfilment of the representatives’ duties.²⁰ There is no European standard for the organisation and working-methods for a parliament, including the correct level of attendance for the parliament to function properly. This issue is context dependent and should be considered in light to the specific organisation, working-methods and rules of procedure in the Verkhovna Rada.

33. However, as mentioned above, any interference in the right to stand for election and to serve as an elected representative must be proportionate. A very high attendance requirement with

¹⁸ See CDL-AD(2005)015, par. 12.

¹⁹ See PACE Resolution 1549 (2007), par. 9.

²⁰ See CDL-AD(2019)015, par. 60.

very limited grounds for exemptions may easily fall short of a proportionality test. Whether or not the attendance requirement of one third of the plenary and/or committee meetings is disproportionate, depends on the working-methods in the Verkhovna Rada, for example the frequency of the sessions, whether other parliamentary duties render the requirement particularly challenging for specific groups of representatives, and so on. In this case, it is significant that Article 81.2.7 allows for exemptions from the one-third rule if there are "valid reasons". Such reasons should be set out in the Verkhovna Rada's rules of procedure and should for reasons of foreseeability and consistency not be left to the free discretion of the parliamentary majority. Depending on the circumstances, other, milder disciplinary sanctions should be foreseen, as an alternative to loss of mandate, in line with the principle of proportionality.

C. Loss of mandate due to impersonation between MPs

34. Article 81.2.5 of the Draft Law stipulates the termination of the mandate in cases of impersonation between MPs. The loss of mandate operates "from the moment of entering into legal force of the court's decision establishing this fact". The wording of this provision suggests that the court is empowered only to ascertain that impersonation has been committed, but not to decide on whether the seriousness of the act justifies the loss of mandate. While impersonation certainly deserves disciplinary sanctions and, depending on the circumstances these could include pecuniary sanction, suspension or (conceivably) loss of mandate, providing for an *automatic* loss of mandate for *any* act of impersonation, irrespective of its seriousness, context or repetition, for example, or any other mitigating circumstances may be said to fall short of the proportionality requirement.

E. Is there a link between the content of the proposed amendments and the context of Article 85.1.5 of the Constitution (according to which the Verkhovna Rada of Ukraine determines, in particular, "the fundamentals of the implementation of the strategic course of the state on obtaining the full-fledged membership of Ukraine in the European Union") and of Article 102.3 of the Constitution (according to which the President of Ukraine is, in particular, "a guarantor of the implementation of the strategic course of the state for obtaining the full-fledged membership of Ukraine in the European Union")? If it is so, what such a link implies?

35. It is not for the Venice Commission to assess whether the proposed amendments are in line with Articles 85.1.5 and 102.3 of the Constitution which relates to the Verkhovna Rada's determinations on "the fundamentals of the implementation of the strategic course of the state on obtaining the full-fledged membership of Ukraine in the European Union". These questions relate to terms presumably set by the European Union in its political dialogue with Ukraine. While such terms may have a legal dimension, that legal dimension would in the end fall under the jurisdiction of the Court of Justice in the European Union, and it falls therefore to the European Union to decide whether or not the terms are met.

36. If, however, as is assumed to be the case, a key component of the accession process involves respect for democratic norms and human rights, then these amendments may be seen as problematic in both respects for the reasons set out in this brief.

- F. If the proposed amendments meet the requirements of Articles 157 and 158 of the Constitution, but in any possible way are not in compliance with the fundamental principles of the constitutional order of Ukraine as defined by the provisions of Chapter I of the Constitution, in particular, the principles of democracy (Article 1), human rights (Article 3), the rule of law (Article 8), what are the implications of this situation for the process of amending the Constitution as regards further action for the organ of constitutional control as well as for the constitutional legislator?

37. In order to comply with international standards, any interference with the enjoyment of fundamental rights needs to have a legal basis, to pursue a legitimate aim and to be proportionate to that aim and necessary in a democratic society. Constitutional provisions allowing for unjustified or disproportionate interference should be duly amended, should be removed or should not be adopted.

38. The Venice Commission remains at the disposal of the Constitutional Court of Ukraine for further assistance in this matter.

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